UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

INTERNATIONAL BROTHERHOOD OF TEAMSTERS,

Charging Party, **Case Nos. 21-CA-150873**
21-CA-164483
and **21-CA-175414**
21-CA-192602

XPO CARTAGE, INC.,

Respondent.

RESPONDENT XPO CARTAGE INC.'S REPLY BRIEF TO THE COUNSEL FOR THE GENERAL COUNSEL'S ANSWERING BRIEF

Pursuant to Section 102.46 of the National Labor Relation Board's ("Board") Rules and Regulations, Respondent XPO Cartage, Inc. ("XPO") respectfully submits this Reply Brief to the Counsel for the General Counsel's ("GC") Answering Brief to Respondent's Exceptions to the Decision and Order of Administrative Law Judge ("ALJ") Christine E. Dibble ("ALJD").

I. INTRODUCTION

The GC's answering brief is most notable for underscoring the problems with the ALJ's decision, most importantly that it ignores the ALJ's own findings that the Owner-Operator drivers have the right to control the day-to-day aspects of their work. The GC instead seeks to lose the forest in the trees by focusing on miscellaneous details and taking the position that undisputed evidence supporting XPO is, for some unstated reason, not enough. The GC's approach to XPO's objection to the ALJ's unfair labor practice findings simply repeats the errors

of the ALJ's Decision by relying on discredited testimony and improperly attempting to place the burden of proof on XPO.

II. ARGUMENT

A. The GC's Arguments Do Not Refute the Independent Contractor Status of the Owner-Operators

The issue of XPO's lack of control over the Owner-Operators, which the GC assiduously ignores, bears repeating:

> There was almost universal agreement from the drivers who testified that they decide which loads to accept, the number of hours to work, which shift to work, when to take time off from work, when to take breaks, selection of the delivery route, and exclusive control over the trucks they drive which includes most maintenance and repair decisions. Although the General Counsel argued that in practice drivers were retaliated against for rejecting loads, I find otherwise. The ICOC specifically allows drivers to reject loads without suffering negative consequences from the exercising of this right. The drivers' rights to reject loads was not merely theoretical.

ALJD p. 15.

The GC does not, because he cannot, attack this critical finding. Instead, the GC opts to raise various issues of limited significance in an attempt to create an image of control where none exists. The GC's errors are obvious and do not require extended discussion.

Government Control is not Company Control: The GC attempts to parse the DC Circuit's decision in *FedEx I* to argue that the ALJ did not err in using regulatory mandates as evidence of control. Counsel for the General Counsel's Answering Brief to Respondent's Exceptions ("GC Br.") at 4. That simply is not the case. "Consistently the courts have held that regulation imposed by governmental authorities does not evidence control by the employer." *NLRB v. Associated Diamond Cabs, Inc.*, 702 F.2d 912, 922 (11th Cir. 1983); *RA Leisure Servs., Inc. v. NLRB*, 782 F.2d 456, 461 (4th Cir. 1986); *Local 777, Democratic Union Org. Comm.,*

Seafarers Int'l Union of N. Am., AFL-CIO v. NLRB, 603 F.2d 862, 875 (D.C. Cir. 1978); *Diamond L. Transp.*, 310 N.L.R.B. 630, 631 (1993).

The Owner Operators Own Their Vehicles: The GC's extensive discussion fails to change the fact that whether leased or owned, the Owner Operators own the tractors. *See* XPO's Answering Brief to the Counsel for the General Counsel's Limited Exceptions ("XPO Answering Br.") at 6-7. The GC continues to rail against the wind by arguing from leasing agreements that have long since expired. GC Br. at 6.

The GC also relies on a picture of a container with an XPO logo and the unsupported speculation of two witnesses in a futile attempt to argue that XPO provides the trailing equipment for drivers. GC Br. at 5. This alleged "evidence" simply is insufficient as a matter of law. A picture of a container with an XPO logo does not prove anything other than that one container contained an XPO logo. Indeed, the XPO name and DOT numbers are required on side of the Owner Operator tractors, yet XPO without question does not own those tractors.

The GC seeks to bolster his argument with nothing more than hearsay and rank speculation on the ownership of the containers used by shipping companies. GC Br. at 6. Domingo Avalos claimed that some unidentified XPO workers supposedly told him that the "boxes" were the "property" of XPO. Avalos 306. Similarly, Napoleon Gaitan, testified only that the containers belonged to XPO without any indication of the basis for this knowledge. Gaitan 680. Quite simply, such hearsay and unfounded speculation as a matter of law does not meet the GC's burden of proof. *Multi Color Indus., Inc*., 317 N.L.R.B. 890, 897 (1995); *Churchill's Rest*., 276 N.L.R.B. 775, 789 (1985).

What probative evidence does exist on equipment does not support the GC's arguments. Jose Herrera, testified the trailing equipment used to haul freight, including the chassis, was

provided by either XPO's shipping clients or the rail yards where the freight was picked up. Herrera 68-69.[1] Avalos inadvertently validated Herrera's testimony when he described in great detail picking up the containers at the rail yard, which already had been loaded with goods by parties other than XPO. Avalos 2054-55. What Avalos did not testify to was that these containers contained any XPO logo. This complete absence of evidence of ownership is why the GC ultimately is reduced to relying on the wholly insubstantial hearsay testimony describing what unidentified parties supposedly believed.

In any event, as XPO pointed out in its Answering Brief to the GC's Exceptions, the tractor itself is the costliest and most important instrumentality of work to a truck driver. XPO Answering Br. at 6.

Owner Operators Actively Negotiated Both the Terms of the ICOC Agreement and Specific Delivery Rates: The GC does not dispute that negotiated changes happened, the record is clear that they did, but rather that they did not happen sufficiently for his liking. GC Br. at 4, 12. The GC is reduced to such an argument because the record is unassailable. Miguel Camacho testified not only that a change was made to the agreement based on input received from the Owner-Operators and their attorneys, but was specific as to the precise portion of the agreement affected. Camacho 1168-69, GC Exh. 60 at p. 85. Similarly, The GC seeks to dismiss Camacho's undisputed testimony of negotiated changes as insufficient in itself, while ignoring the fact that such changes are explicitly contemplated in the Independent Contractor Operating Contract ("ICOC") agreement, GC Exh. 60 at Schedule B, Section 2, with specific

[1]The GC neglects to mention that Gaitan testified that he did not know who owned the truck chassis on which the containers are loaded. Gaitan 680.

examples discussed in the corroborating testimony of former XPO General Manager Javier Del Campo and dispatcher Armando Rodriguez. Del Campo 1702; Rodriguez 1651.

Drivers Can and Do to Shop Around for Insurance: The GC's tries to rehabilitate the ALJ's finding that XPO's mere offer of insurance coverage in the ICOC is an indicia of control. GC Br. at 5. Once again, the GC does not dispute the evidence that some drivers do purchase insurance coverage from other sources. Trauner 2037. Nor does the GC address the evidence which fully explains why most Owner Operators choose to purchase the coverage offered by XPO. Davis 1770-71. Ultimately, the GC's argument comes down to nothing more than the erroneous conclusion that the mere fact that Owner Operators purchase insurance from XPO makes them employees.

Contact with XPO's Shipping Customers is not Determinative: The GC fails completely to deal with XPO's argument that the over one thousand transportation companies such as XPO are the Owner Operators' customers. The GC's speculation about the movement "one would expect" is simply that, speculation with no probative value. GC Br. at 11. As XPO already has demonstrated, there are many reasons why a driver would not leave a lucrative economic relationship. *See* XPO Brief in Support of Exceptions at 34-35. And in any event, the record evidence that exists shows precisely this movement, such as the twenty Owner Operators who ceased performing services for XPO when presented with a new agreement. Camacho 1167. The GC also ignores the testimony of Owner-Operator Blair Davis, who specifically testified that he routinely investigates the rates paid by other freight brokerages, choosing to maintain his relationship with XPO due to his assessment that it offers the best terms. Davis 1779-80.

The GC's attempt to distinguish *Arizona Republic* and *Dial-a-Mattress* is much ado about nothing. The GC does not dispute that those cases hold that the Owner-Operators can be found to be independent contractors irrespective of their level of contact with XPO's shipping customers. GC Br. at 11-12. Rather, the GC simply argues a host of other factors which amount to nothing more than a generic restatement that the test is a multi-factor test. No one disputes that point.

B. The GC's Analysis of the Owner Operators' Entrepreneurship Does Not Reflect Economic Reality

The GC admits that drivers have entrepreneurial opportunity, he simply argues against a strawman of his own creation – that the opportunity is defined by the number of drivers who own multiple trucks or hire second seat drivers, which the GC sees as insufficient. GC Br. at 9-10. This argument is flawed for many reasons:

- The GC's admission that Owner-Operators with multiple trucks exist conclusively demonstrates the ***opportunity*** exists. That is what the law requires, the opportunity. Nothing more is needed. It is irrelevant that many drivers do not avail themselves of this opportunity.

- The GC goes to great lengths to similarly dismiss the hiring of second seat drivers as not happening frequently enough for his liking. The GC also confuses the regulatory requirement that XPO approve those drivers with the fact of their hiring.

- The GC ignores virtually every other form of opportunity, such as selecting more profitable hours or routes, hours worked, and managing expenses.

- The GC also ignores the evidence given by its own witness that such decisions matter – Avalos's loss of his truck due to his decision to operate a damaged vehicle rather than repair it.

Of course, the GC never explains why he believes there is any significance to his argument that few drivers "have the ability to own multiple trucks" or hire second seat drivers. The GC produced no evidence that XPO constrains the ability of the Owner-Operators to

purchase additional trucks. To the contrary, according to the testimony of one multiple truck owner, the decision is based on pure entrepreneurship – personal financial wherewithal and desire to increase his earning potential. Davis 1773-74. The GC's argument simply underscores that the ALJ's decision erroneously ignores the opportunity which is the touchstone of the analysis.[2]

Further, the GC, like the ALJ before him, posits that the failure to qualify Humberto Canales as a second seat driver for an Owner-Operator working for XPO shows that the ability to hire second seat drivers is somehow illusory. GC Br. at 10. To make this weak argument, the GC is forced to diminish legitimate business concerns by claiming that XPO's concerns with Canales' history of abusive and bullying conduct was a mere matter of "personality or likability." Del Campo 1707; Rodriguez 1659-61. The GC's attempt to convert such misconduct to a personality issue conclusively demonstrates just how insubstantial is this argument.

C. The GC's Arguments in Support of the ALJ's Findings on the Specific Unfair Labor Practice Violations Against XPO are Unavailing

The GC claims that XPO is merely contesting the credibility determination made by the ALJ relating to the unfair labor practice allegations stemming from the purported meeting between Enrique Flores and Humberto Canales. GC Br. at 17. To the contrary, XPO agrees with the ALJ's scathing overall assessment of Canales's credibility.

[2]In any event, the inference sought by the GC that few drivers hired second seat drivers is contradicted by the record. Most of the drivers who testified at the hearing were themselves second-seat drivers, hired second-seat drivers to work for them, or both. Avalos 253-54, 350, 386-387, 467-68; Canales 904-06; Solis 2071-72, 2076; Gaitan 642, 716-17; Lopez 620-21; Montenegro 1452-53, Davis 1766-68, 1775.

What XPO argues is in error is the acceptance of Canales's testimony on one point despite the ALJ's scathing criticism of his testimony in its entirety. This is not a case in which the ALJ had to choose between the testimony of two credible witnesses. Rather, it is one in which the ALJ credited the testimony of a witness which the ALJ found to be untrustworthy to the point of being intentionally misleading. AJLD p. 40-41. The dicta cited by the GC from *Hills & Dales General Hospital* regarding the general ability of ALJ's to credit different parts of a witness' testimony does not address the kind of thoroughgoing discrediting that ALJ Dibble's decision gave to Canales.

With regards to the ALJ's findings regarding XPO's decision to deny Domingo Avalos a loan, the GC's brief erroneously downplays the lack of evidence of an unlawful motivation. The GC spills a great deal of ink on the issue of animus. But animus alone is not enough, the issue is discriminatory animus – proof that the animus was the motivation for the decision. *Wright Line,* 251 N.L.R.B. 1083, 1089 (1980). That is where the ALJ's decision and the GC's argument continue to fail.

The GC claims to be unclear on the connection between the finding that XPO committed a ULP in denying Avalos a loan while dismissing another ULP involving Avalos. GC Br. at 21. In dismissing the ULP, the ALJ found there was "no direct or circumstantial evidence proving that Respondent harbored animus against Avalos because of his protected conduct." ALJD p. 31. This broad finding of an absence of animus contradicts and undermines any finding that Camacho's and Chavez's e-mails demonstrated animus rather than a genuine concern for the legal risks inherent in addressing Avalos's loan request.

Even assuming animus, the GC still has failed to meet his burden that the reasons proffered by XPO for denying the loan were mere pretexts. Emails between XPO employees

regarding Avalos's loan request explained that Avalos's request was "doubtful" as it "sounded like major neglect." XPO Exh. 17, *see also* GC Exh. 73. To this day, the GC has presented nothing to dispute the fact that Avalos's negligence in maintaining his truck was a consideration in denying the loan. To the contrary, Avalos's flat out refusal to contribute a small amount of his own money to the repair, and his insistence that XPO bear the entire risk, validated XPO's well-founded concerns about making a loan to Avalos. The failure of the GC to meet his burden to show these reasons were pretextual requires dismissal of the ULP finding.

The GC obviously recognizes these fatal flaws in his case because he now, for the first time, attempts to question the diagnosis of Jesus Perez, the mechanic who prepared the repair quote for Avalos's truck. GC Br. at 22. That argument must fail because the GC does not explain how Perez's actions somehow translate into unlawful action by XPO. Regardless of whether Perez's diagnosis was correct or incorrect, it simply does not change that the information Perez communicated to XPO on which XPO acted was that Avalos's truck's problems were the result of neglect. Perez 1739. XPO acted lawfully on the information it received.

But beyond their complete lack of evidentiary value, the GC's arguments are frivolous. Avalos himself never disputed Perez's diagnosis. Perez 1734, Avalos 339. Yet the GC tries to fabricate some grand conspiracy merely by observing that earlier inspections found no problems with Avalos's truck. Prior inspections of the truck have nothing to do with Perez's examination of the truck just weeks before it broke down, at a time when Avalos brought the truck in precisely because something was wrong with the truck. Perez 1729-30. Nor are they as relevant as Perez's post-mortem inspection of the engine after it had seized, an examination that revealed that Avalos had continued to drive the truck after multiple engine components had failed. Perez

1730-34.[3] What the GC's overreach demonstrates, if anything, is the absence of evidence to support the finding of a ULP.

III. CONCLUSION

For the foregoing reasons and the reasons set forth in XPO's Brief in Support of Exceptions, the Owner-Operators are properly classified as independent contractors and are not within the protections of the Act. Accordingly, the ALJ's Decision finding the Owner-Operators to be employees should be reversed and the complaint dismissed. Further, even assuming arguendo that the Owner-Operators are subject to the Act, the ALJ's findings that XPO committed specific unfair labor practices are also in error and should be reversed and the complaint dismissed in its entirety.

Respectfully Submitted,

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[3]Despite the GC's claim, GC Br. at 22, Perez is not an XPO employee. Perez is a business owner operating a shop location in XPO's Commerce yard, which is one of three locations he operates and the only one at an XPO location. Perez 1721.

CERTIFICATE OF SERVICE

I hereby certify this 4th day of January, 2019, that a copy of the Respondent XPO Cartage's Reply Brief to the Counsel for the General Counsel's Answering Brief was electronically served on the Region through the Board's electronic filing system, and also served on the following by email:

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